

Report to:

**Mike Eastwood
Countryside Access Team Leader, for
Approval of recommendation**

Date:

16 February 2017

Title:

**The Commons Act 2006
Schedule 2(2)
Non-registration of common land**

**The Commons Registration (England)
Regulations 2014**

**Application 2908
0.544 hectares of land at Hugus Common in
the parish of Kea**

Divisions Affected

Kea

Author: **Martin Wright**

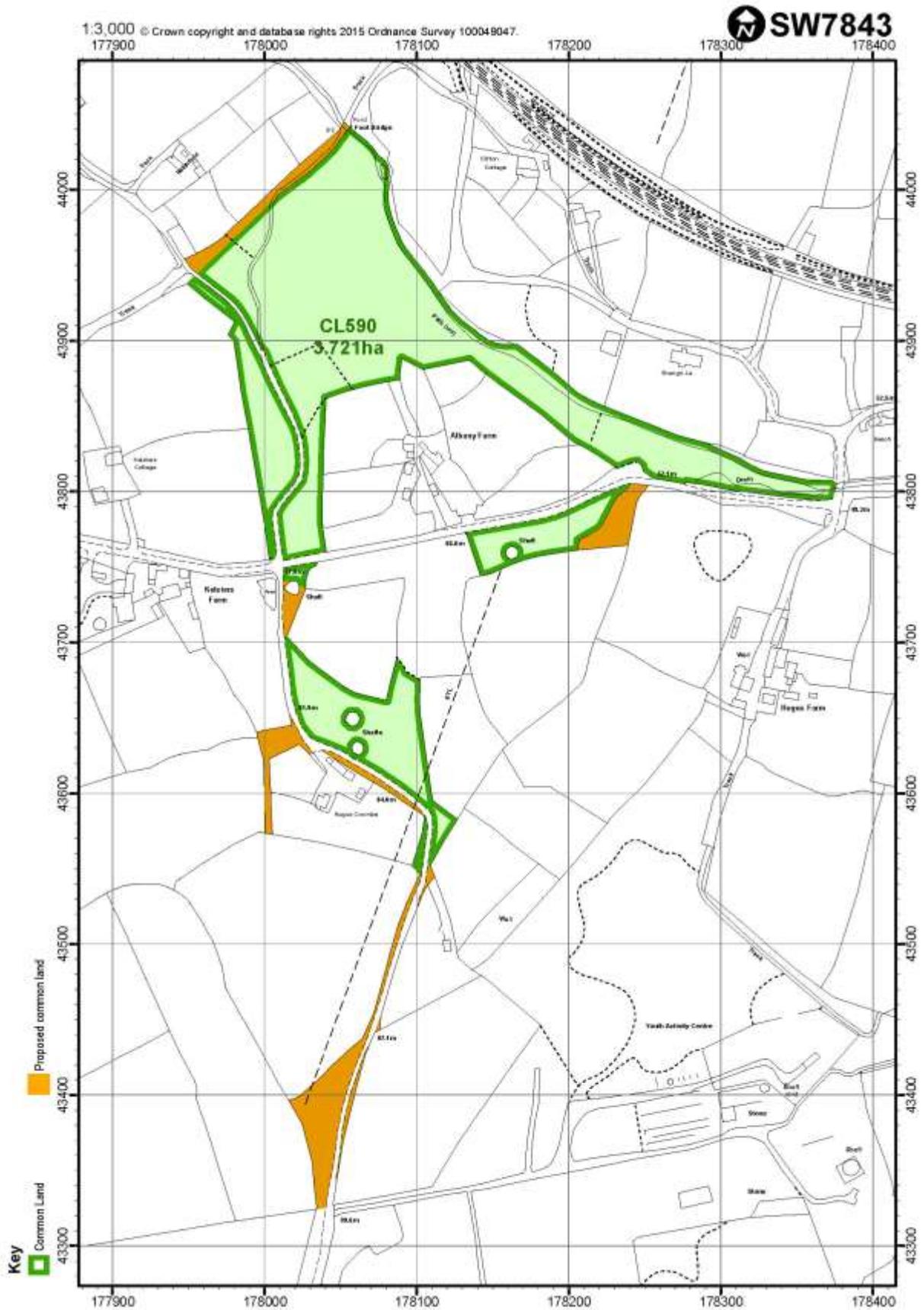
Role: **Commons and Greens
Registration Officer**

Contact: **Tel: 01872 224773 E-mail: mwright@cornwall.gov.uk**

Recommendation:

The application is granted

Application Map



1. Introduction:

Cornwall Council has a duty under Section 4 of the Commons Act 2006 to keep a register of common land and a register of town and village greens. Cornwall Council also has a duty under paragraph 26 of the Commons Registration (England) Regulations 2014 to determine applications to amend the registers of common land and town and village greens, unless the registration authority has an interest in the outcome of the application such that there is unlikely to be confidence in the authority's ability impartially to determine it.

Commons Registration Application No. 2908 was made by Mr Tomas D.J.S. Hill seeking to register 0.544 hectares of land at Hugus Common in the parish of Kea, as common land under Schedule 2.2 of the Commons Act 2006, as coloured orange on the attached plan.

This report examines the evidence for and against whether the application meets the statutory tests set out in Schedule 2.2 of the Commons Act 2006.

The report has been prepared to be presented to a delegated officer. The delegated decision is to consider whether to accept, refuse or refer the matter to an independent inspector to make a recommendation to accept or refuse the application.

2. Background and Corporate Objectives:

The legislative background is for the applicant to show that:

- The land was not at any time finally registered as common land or as a town or village green under the 1965 Act;
- Is land which is
 - Regulated by an Act made under the Commons Act 1876 (c.56) confirming a provisional order of the Inclosure Commissioners;
 - Subject to a scheme under the Metropolitan Commons Act 1866 (c.122) or the Commons Act 1899 (c.30);
 - Regulated as common land under a local or personal Act; or
 - Otherwise recognised or designated as common land by or under an enactment;
- and for the registration authority to comply with section 27 of the Commons Registration (England) Regulations 2014 – Method of determining applications and proposals.

3. Decision and Supporting Information (Including Options):

An objection has been received from Foot Anstey, solicitors of Exeter, acting for the owner of the application land, the Honourable E A H Boscawen (the Tregothnan Estate).

As Cornwall Council has no interest in the application land all parties can be confident that the registration authority can impartially determine the

application, and there is no need to refer the application to the Planning Inspectorate for determination, as would otherwise be the case.

The options available to the registration authority are to:

- i approve the application, in whole or in part;
- ii reject the application; or
- iii refer the application to an independent inspector to recommend accepting or refusing the application.

It is recommended that the available evidence is sufficient for the Council to approve the application. Regulation 27(7)(a) requires that an application cannot be accepted or refused without first offering the interested parties an opportunity to make oral representations.

4. Contributions to Corporate Priorities:

In determining the application the Council is performing its statutory duty set out in sections 6 to 17, 19 and 22 of the Commons Act 2006 to determine applications seeking to amend the registers of common land and of town and village greens.

5. Financial Implications and Budget:

The process of determining whether the application is accepted or refused is met from existing budgets.

If approved, the management of the common will continue to be the responsibility of the owner.

6. Other Resourcing Implications:

None.

7. Legal Implications:

Cornwall Council has a statutory duty set out in paragraph 26 of the Commons Registration (England) Regulations 2014 to determine applications to amend the registers of common land and town and village greens.

8. Equality Impact Assessment:

It is not considered that an Equality Impact Assessment is required or that there is likely to be any equality impact as a consequence of this decision.

9. Significant risks:

Should the Council make a decision which is opposed there may be a risk of judicial review. These costs can be significant and can represent a financial risk to the Council, though this should not allow this information to influence the decision about whether the application should be accepted or refused, as such decision should be based on the evidence before it.

10. Consultation including Overview and Scrutiny Committee and Local Member Representation:

10.1 Overview and Scrutiny Consultation/Comments:

As this is a regulatory matter and not a matter of strategic importance the Environment Overview and Scrutiny Committee has not been consulted.

10.2 Local Division Member Comments:

Councillor John Dyer has been informed of both the Notice of the application, and the draft decision.

Appendices:

None

Background Papers:

All papers relating to this application [No. 2908].

11. BACKGROUND

- 11.1 An Application was received on the 17th June 2015 from Mr Tomas D.J.S. Hill for the registration of land as common land under Schedule 2.2 of the Commons Act 2006, for 0.544 hectares of land at Hugus Common, Kea in the County of Cornwall. The land abuts 3.721 hectares of common land registered under unit No. CL590, and a public bridleway. The application form and map is shown as an appendix to this report.
- 11.2 Paragraph 16 of the Commons Registration Regulations 2014 requires an application to be made in accordance with, amongst other things, Schedule 4 of the Regulations. Section 14 of Schedule 4 of the Regulations refers to applications made under Schedule 2, complying with paragraphs (2) and (3) if applicable of the 2006 Act.
- 11.3 The following describes where the application meets and does not meet the legislative requirements for registration as common land.

LEGISLATIVE REQUIREMENTS**Schedule 2(2)(a) of the 2006 Act**

- 12** 'The land was not at any time finally registered as common land or as a town or village green under the 1965 Act.'

It is confirmed that none of the land was at any time finally registered as common land or as a town or village green under the Commons Registration Act 1965.

Schedule 2(2)(b) of the 2006 Act

- 13** 'Is land which is:
- Regulated by an Act made under the Commons Act 1876 (c.56) confirming a provisional order of the Inclosure Commissioners; or
 - Subject to a scheme under the Metropolitan Commons Act 1866 (c.122) or the Commons Act 1899 (c.30); or
 - Regulated as common land under a local or personal Act; or
 - Otherwise recognised or designated as common land by or under an enactment.'

It is claimed the land is common land by virtue that it is recognised or designated as common land under the 1846 Tithe Map for the parish of Kea, made under the Tithe Commutation Act 1836. It is further claimed in the applicants supporting evidence that the land falls within parcel No's 1397 and 1600, described as Hugo's Common comprising 7 acres, 1 rood and 9 perches, and 5 acres, 3 roods and 17 perches respectively.

Schedule 2(2)(c) of the 2006 Act

14 'Is land to which this Part applies.'

It is confirmed that the application land is land to which this Part of the 2006 Act relates.

Section 14(1) of Schedule 4 to the 2014 Regulations

15 'An application made under Schedule 2 to the 2006 Act, for the purpose of remedying non-registration or mistaken registration under the 1965 Act must be made on or before 31st December 2020, where the application is to an original registration authority.'

Cornwall Council is an original registration authority, and the application was made on 16th June 2015.

Section 14(2) of Schedule 4 to the 2014 Regulations

16 'An application made under Schedule 2 to the 2006 Act must include a description of the land to which the application relates.'

The land is described as Hugus Common located in the parish of Kea, and comprises approximately 0.544 hectares.

Section 14(3) of Schedule 4 to the 2014 Regulations

17 'In an application made under paragraph 2 or 3 of Schedule 2 to the 2006 Act, the land to which the application relates may only include land that is covered by a building or which is within the curtilage of a building if the owner of that land consents to its registration.'

The application land does not include land covered by a building or which is within the curtilage of a building.

Section 14(4a) of Schedule 4 to the 2014 Regulations

18 'An application made under paragraph 2 of Schedule 2 to the 2006 Act must include evidence of the application of that paragraph, as described in paragraph 2(2) of that Schedule, to the land to which the application relates.'

The application land relates to Schedule 2(2)(b)(iv) of the 2006 Act. The applicant has identified the Tithe Commutation Act 1836 as the Act under which the land was recognised or designated as common land.

Section 14(4b) of Schedule 4 to the 2014 Regulations

19 'An application made under paragraph 2 of Schedule 2 to the 2006 Act must include a copy of any enactment or scheme referred to in paragraph 2(2)(b) of that Schedule, by which the land to which the application relates is regulated, recognised or designated, or to which it is subject.'

The application was accompanied by an extract of the Tithe map and apportionment for the parish of Kea (1846), whilst the commons registration authority, as part of Cornwall Council, already holds a copy of the Tithe Commutation Act 1836

Section 14(4c) of Schedule 4 to the 2014 Regulations

20 'An application made under paragraph 2 of Schedule 2 to the 2006 Act must include evidence, if applicable, that any consent required under sub-paragraph (3) has been given.'

This is part is not relevant, please see paragraph 17 above.

21 Representations by Foot Anstey for the Tregothnan Estate

21a We note that the land included in the application form is of the manor, but contrary to the assertion of the applicant, and the non-statutory guidance note of Defra, it is not the case that most land in England and Wales (including Cornwall) was manorial.

21b All of the property is owned by their client and has been registered with the Land Registry.

21c The land is not uncultivated as the hedges either side of the bridleway have been cut and maintained. This area forms part of a track which has been used historically to accommodate wide agricultural vehicles, and is necessary in order to accommodate historic and contemporary agricultural vehicles.

21d The areas are not roadside waste or long acre. The land is not highway; it is enclosed by hedges for private use.

21e Critically, where the application land does not abut a public highway, members of the public cannot access any of the application land without trespassing along our clients private track or climbing over hedges; it is not open land.

21f The land is not unoccupied, it is occupied as a track.

21g The land shown in the photograph marked B is not unoccupied land as it is clearly occupied by an electricity pylon. The access to the pylon is maintained.

21h The triangle of land shown in photograph C is fenced to the western edge and a gate to that fence is clearly visible. The remainder of the triangle has not been enclosed because it forms part of the Estates neighbouring title, CL256598. The ground is cut and maintained.

21i The roadside land shown in photograph E abuts agricultural buildings at Hugus Coombe. The hedges are regularly cut by tenants of the Estate and the land is frequently occupied by the occupiers of buildings at Hugus

Coombe. The space is required to accommodate agricultural traffic which serve the nearby farmland.

- 21j** The land shown in photographs F, G, H and I forms part of the land included in the Farm Business tenancy and is occupied by virtue of that tenancy. The tenancy contains obligations on the tenant to maintain the areas included within the application.
- 21k** The Farm Business Tenancy grants a right of way with or without vehicles and livestock 'over the waste areas to the northern side of the aforesaid land (A-B-C) for agricultural access to OS No's 1288 and 1289'. The area shown in photographs P and K are maintained by the tenant of the Farm Business Tenancy in order to preserve the access which is granted by the tenancy.
- 21l** The land shown in photographs J and K are presupposed by the applicant to be roadside waste forms turning space on the narrow track. The photographs clearly show that the roadside has been regularly maintained by the tenants of the Estate to provide access along the track. The track narrows as it reaches the crossroads and therefore the space included in the application is part of the track to allow safe passing for vehicles and is not roadside waste.
- 21m** The land shown in photographs L and M shows the roadside has been consistently maintained by tenants of the Estate to ensure safe passage along the track. The land identified is the thick hedge denoting the boundary, it is not roadside waste.
- 21n** The land shown in photographs N and O is not roadside waste. The tenants of the Estate maintain the space to prevent trespassers entering onto the land which contains mineshaft. Photograph N shows the wooded bank which is maintained for the purpose of restricting access to the nearby mineshaft. The land is cultivated in this way to create a boundary to the nearby land, it is not roadside waste.
- 21o** The property has and is clearly still being cultivated and therefore cannot be waste. Given the demise, and particularly, the use of the property for agricultural purposes, it can be seen that the property is both cultivated and occupied.
- 21p** The burden of proof is on the applicant and he is required to prove, on the balance of probabilities, that the property is manorial waste.
- 21q** Registration as a common will significantly impede management of the land as agricultural land. Importantly, registration will not allow any access by members of the public where the land concerned is not directly accessible from the public highway.
- 22 Applicants comments**
- 22a I note Foot Anstey state that 'the land included in the application form is of the manor'.

- 22b It is notable that only a small area per the application is subject to the tenancy agreement dated 23rd November 1996 between the Hon. Evelyn Boscawen and Kenneth Vincent. Parcel 1285 is described as "unenclosed".
- 22c The second Schedule makes reference to "*rights of access with or without vehicles and livestock over the waste areas to the northern side of the aforesaid lane (A-B-C) for agricultural access to OS No's 1288 and 1289 pt.*" This 'waste' apart from the small areas subject to this application, is now registered as common land as per COM582.
- 22d All of the application land is open and abuts a public highway being either an unclassified road or a public bridleway. I do concur, however, with Foot Anstey the application land "*is not highway*".
- 22e A number of PINS decisions (COM 325, COM 459 and COM 553) have confirmed that private trackways and metalled tracks are not inconsistent with common land.
- 22f With regard to land being occupied by virtue of an electricity pylon, COM582, states that "*a pylon ... does not appear to indicate occupation as intended under the 2006 Act.*"
- 22g PINS decision COM 384 (Carn Galver, Zennor) by Mrs Helen Slade, MA FIPROW, succinctly addresses management concerns: "*The management of the land is not a matter which affects my decision which must be based on the statutory criteria I have set out above. Mechanisms exist for the management of common land if necessary, and these are subject to different legislative regimes.*"

23 Registration Authority's view

The Registration Authority makes the following comments.

- 23a** The application is made under paragraph 2 of Schedule 4 where, primarily, the applicant has to show the land is recognised or designated as common land under statute.
- 23b** The applicant has shown that the land is recognised or designated as common land on the Tithe map and apportionment for the parish of Kea under the Tithe Commutation Act 1836, and this is not disputed.
- 23c** Whether the application land is waste in the sense of it being open, unenclosed and unoccupied is not part of the legislative criteria under which this application has been made, and therefore much of the objectors statement is not relevant to the matter in hand.
- 24d** Management of the land and its accessibility by members of the public are not criteria that can be taken into account when determining the application. However I see no reason why the recent past management of the land, and its use for parking agricultural vehicles should not continue if the land is granted common land status.

24 Other Matters**24a Objector:**

The objector wishes to complain about the conflict between the public office of the applicant as an officer of the Council, and his campaign (to register land belonging to the Tregothnan Estate as common land), particularly given his position in the Commons and Village Green Office. He has access to all applications and information received. The applicant's campaign gives the appearance that the Council Officers managing that office are biased in favour of applicants. Even if Mr Hill is not permitted to access the Council file relating to this application, he does give guidance to other applicants.

24b Applicants comments:

I have not worked within the Commons and Greens Office for over a year. Even had I still been employed, various Planning Inspectors have considered the matter and found no conflict of interest. I am entitled to make an application as a member of the public which I have done so using publically available information.

24c Registration authority's view:

Mr Hill works in the Local Land Charges section of the Planning Department, of which the Commons and Greens Registration function used to form a part. On 1st April 2014, following an internal re-organisation, the Commons and Greens Registration function was moved to the Countryside Access section of the Natural Environment Department. It is confirmed that since 1st April 2014 Mr Hill has had no involvement in the Commons and Greens Registration service of the authority.

As an original Commons Pioneer Authority the authority welcomes applications made under Schedule 2 of the Commons Act 2006 to help test the legislation ahead of national implementation, where there is a prima facie case for doing so. This applies equally to applications seeking to de-register wrongly registered land from the register, as well as seeking to register land as common land.

25 Method of Determining Application

The Commons Regulations (England) Regulations 2014 states that:

27(1) The determining authority must, in determining any application or proposal, take into account:

(d) any oral representations made by any person in accordance with paragraph (7)

27(6) Paragraph (7) applies in relation to any application which the determining authority decides to determine without holding a public inquiry or hearing in accordance with regulation 32.

27(7) the determining authority:

(a) May not refuse an application without first offering the applicant an opportunity to make oral representations; and

(b) May not grant or refuse an application without first offering any person (other than the applicant) for whom the grant or refusal would represent a determination of that person's civil rights an opportunity to make oral representations.

In September 2016 the Council shared the contents of a draft decision with interested parties, asking in particular of the objector whether they wished an opportunity to make oral representations. Whilst initially this offer was accepted, in February 2017 the objector's representative confirmed their client was withdrawing their request for an oral hearing.

26 Decision

On the balance of probabilities the criteria for the registration of the application land as common land have been satisfied, and the application is granted.

Name: *Mike Eastwood*

Title: Countryside Access Team Leader

Date: 14 February 2017

21 Supporting Information

Application 2908

22 Background Papers:

The Commons Act 2006:

<http://www.legislation.gov.uk/ukpga/2006/26/contents>

The Commons Registration (England) Regulations 2014:

<http://www.legislation.gov.uk/uksi/2014/3038/contents/made>

Guidance to commons registration authorities and the Planning Inspectorate for the pioneer implementation (version 2.0, December 2014) (Defra)

<https://www.gov.uk/common-land-management-protection-and-registering-to-use>